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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 C.S., et. al.,

12 Plaintiffs,

13 vs.

14 CALIFORNIA DEPARTMENT OF  
15 EDUCATION,

16 Defendant.  
17

CASE NO. 08-CV-0226 W (AJB)

ORDER GRANTING MOTION  
FOR INTERVENTION BY RON  
DIEDRICH, IN HIS OFFICIAL  
CAPACITY AS DIRECTOR OF  
CHIEF ADMINISTRATIVE  
LAW JUDGE OF THE STATE  
OF CALIFORNIA OFFICE OF  
ADMINISTRATIVE HEARINGS  
(Doc. No. 14)

18 On February 5, 2008 Plaintiff C.S., by and through his Conservator, Mary Struble  
19 (“Plaintiff”), filed this class action complaint against Defendant California Department  
20 of Education (“Defendant” or “CDE”) alleging Individuals with Education Disabilities  
21 Act (“IDEA”), Supremacy Clause, and Equal Protection violations and seeking  
22 injunctive relief. (Doc. No. 1.) On February 19, 2008 Plaintiff moved for a temporary  
23 restraining order (“TRO”) to restrain Defendant CDE from contracting with the Office  
24 of Administrative Hearings (“Intervenor” or “OAH”). (Doc. No. 4.) On March 7,  
25 2008 OAH moved to intervene as a separate defendant in this action. (Doc. No. 14.)  
26 The Court takes the matter under submission and without oral argument. See S.D. Cal.  
27 Civ. R. 7.1(d)(1). For the following reasons, the Court **GRANTS** OAH’s motion to  
28 intervene in this lawsuit. (Doc. No. 14.)

1 **I. BACKGROUND**

2 The following is a summary of arguments and allegations made in Plaintiff's  
3 complaint and the parties' moving papers. Unless otherwise noted, nothing shall be  
4 taken as a finding of fact by this Court.

5 Plaintiff C.S. is an eighteen year-old, conserved student who qualifies for special  
6 education under the Autism eligibility category. (*Compl.* ¶ 16.) Plaintiff alleges that he  
7 participated as a party in an administrative due process hearing, which was conducted  
8 in such a way as to deny him certain federal and constitutional rights. (*Id.* ¶ 10.)  
9 Plaintiff brings this action on behalf of himself and all others similarly situated.

10 Defendant California Department of Education ("CDE") is a California agency  
11 tasked to administer the California education system. (*Id.* ¶ 25.) By receiving federal  
12 funds, federal law mandates that CDE provide disabled students' parents with impartial  
13 administrative due process hearings. (*Id.*) Defendant CDE contracts with Intervenor  
14 Office of Administrative Hearings ("OAH") to conduct these hearings. (*Id.* ¶ 26.)  
15 Under the contract, OAH must provide Administrative Law Judges ("ALJs")  
16 knowledgeable and trained in special education law. (*Id.* ¶ 10.) CDE is also required  
17 to oversee the ALJ training and implementation of special education law. (*Id.*)

18 On February 5, 2008 Plaintiff filed suit against Defendant CDE, alleging that  
19 CDE failed to adequately supervise OAH's administrative hearing process. (Doc. No.  
20 1.) The gist of Plaintiff's complaint is that CDE's contractual relationship with OAH  
21 is unlawful because the ALJs are neither appropriately trained nor following or  
22 implimenting relevant federal law. (*Id.* ¶ 3.) Plaintiff alleges that he, and all others  
23 similarly situated, have been denied due process as a result of poor ALJ performance.  
24 (*Id.* ¶ 17.)

25 On February 19, 2008 Plaintiff moved for a temporary restraining order, arguing  
26 that CDE should be enjoined from renewing the current contract with OAH, which  
27 expires on July 1, 2008. (Doc. No. 4.) After two continuances, the Court is set to hear  
28 the TRO on April 28, 2008, and Defendant's response in opposition is due on April 14,

1 2008. (Doc. No. 12.)

2 On March 7, 2008 Intervenor Ron Diedich, in his official capacity as Director  
3 and Chief Administrative Law Judge of the State of California Office of Administrative  
4 Hearings (“OAH”), moved for an order permitting OAH to intervene as a defendant  
5 in this action. (Doc. No. 14.) Per OAH’s request, the Court established a briefing  
6 schedule with the goal of granting or denying the intervenor motion before Defendant’s  
7 TRO opposition is due. (Doc. No. 18.) Among other things, the Court ordered that  
8 Plaintiff oppose the OAH’s motion by March 24, 2008, an amount of time consistent  
9 with the time allotted to oppose a noticed motion under the Local Rules. See S.D. Cal.  
10 Civ. R. 7.1(e)(1), (2).

11 On March 24, 2008 Plaintiff opposed OAH’s motion to intervene. (Doc. No. 21.)  
12 The same day, Plaintiff moved *ex parte* for an Order to Show Cause why Defendant  
13 should not be ordered to file an answer to Plaintiff’s complaint. (Doc. No. 24.) The  
14 Court dismissed Plaintiff’s motion as moot when CDE filed an answer the next day, on  
15 March 25, 2008. (Doc. No. 26.)

16 On March 28, 2008 OAH filed its reply. (Doc. No. 28.) On April 1, 2008  
17 Plaintiff moved for leave to file a sur-reply, arguing that he was prejudiced in preparing  
18 his opposition because Defendant CDE had not yet filed an answer. (Doc. No. 29.)  
19 The same day, the Court granted Plaintiff’s motion and Plaintiff filed his sur-reply on  
20 April 4, 2008. (Doc. Nos. 32, 33.) The Court notes that Defendant CDE has not  
21 opposed OAH’s motion, and OAH alleges that CDE is willing to stipulate to the  
22 requested intervention. (OAH Mot. 3.)

23  
24 **II. LEGAL STANDARD**

25 **A. Rule 24(a)(2)—Intervention As A Matter of Right**

26 Rule 24(a)(2) permits anyone to intervene who is “so situated that disposing of  
27 the action may as a practical matter impair or impede the movant’s ability to protect its  
28 interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P.

1 24(a)(2). The Ninth Circuit applies a four-prong test when weighing a Rule 24(a)(2)  
2 intervention motion:

3 (1) the application for intervention must be timely; (2) the applicant must  
4 have a 'significant protectable' interest relating to the property or  
5 transaction that is the subject of the action; (3) the applicant must be so  
6 situated that the disposition of the action may, as a practical matter, impair  
7 or impede the applicant's ability to protect that interest; and (4) the  
8 applicant's interest must not be adequately represented by the existing  
9 parties in the lawsuit.

10 Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817-18 (9th Cir. 2001).  
11 In applying this standard, the court should broadly construe the rule in the proposed  
12 intervenors' favor. U.S. v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002).

#### 13 **B. Rule 24(b)—Permissive Intervention**

14 A party seeking permissive intervention under Rule 24(b) must establish three  
15 threshold requirements: (1) a common question of law or fact with the main action, (2)  
16 timeliness and (3) an independent jurisdictional basis over the applicant's claims. See  
17 League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1308 (9th Cir.  
18 1997); see also Fed. R. Civ. P. 24(b).

19 To justify permissive intervention, intervenors must first establish a legal or  
20 factual question in common with the present litigation. Next, the court considers  
21 whether intervenors filed their motion in a timely manner. In reaching this  
22 determination, the Court should consider "(1) the stage of the proceeding at which an  
23 applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for  
24 and length of the delay." Empire Blue Cross & Blue Shield v. Janet Greeson's A Place  
25 For Us, Inc., 62 F.3d 1217, 1219 (9th Cir. 1995).

26 Finally, the intervenors must demonstrate the court's jurisdiction over their  
27 claims. Permissive intervenor claims ordinarily require an independent jurisdictional  
28 basis. See Beckman, 966 F.2d at 473. This jurisdictional requirement is premised on  
the potential intervenors' desire to litigate the claims' merits. Id.

1 **III. DISCUSSION**

2 OAH's moving papers argue that it meets the requirements for both intervention  
3 as a matter of right and permissive intervention. (OAH Mot. 2–7.) Plaintiff's  
4 Opposition argues that OAH's motion is not ripe, and that OAH fails to meet the  
5 requirements for intervention of right and permissive intervention.<sup>1</sup> (Pl.'s Opp'n 3–6.)  
6 The Court agrees with OAH that it is entitled to intervene, both as a matter of right  
7 and permissively.

8  
9 **A. OAH Is Entitled To Intervene as a Matter of Right**

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11 **i. *OAH's Application To Intervene is Timely***

12 OAH argues that its motion to intervene is timely because it moved to intervene  
13 about four weeks after Plaintiff filed his complaint. (OAH Mot. 4.) Plaintiff either  
14 concedes this element or characterizes it as a "ripeness" determination. (Pl.'s Opp'n  
15 3–5.)

16 As cited above, the Court should consider (1) the stage of the proceeding at  
17 which intervention is sought; (2) prejudice; and (3) the reason for and length of the  
18 delay. Empire Blue Cross & Blue Shield v., 62 F.3d at 1219. In this case, OAH has  
19 moved promptly to intervene to protect its interests, before any significant discovery  
20 or dispositive litigation. Defendant CDE has conceded to OAH's intervention, and  
21 Plaintiff will not be prejudiced by the entry of an additional defendant into the case

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23 <sup>1</sup>Plaintiff's "ripeness" argument really seems to be a argument against the "timeliness"  
24 of OAH's intervenor motion, better framed in opposing intervention as a matter of right. In  
25 any event, Plaintiff's ripeness argument proceeds on several speculative procedural  
contingencies, none of which have any bearing under an analysis of whether OAH timely  
moved for intervention as a matter of right.

26 Plaintiff's Opposition also complains about Defendant CDE's then-lack of an answer in  
the action, arguing that CDE's answer is crucial in opposing OAH's motion for intervention.  
(Pl.'s Opp'n 4.) The Court accepted this argument, to a limited extent, in granting Plaintiff  
27 leave to file his sur-reply. (See April 1, 2008 Order Granting Pl. Leave to File Sur-Reply 1–2.)  
Plaintiff's sur-reply, however, simply re-argues the law of intervention, and Plaintiff's only use  
28 of CDE's answer is in a very limited reference to a denial "on the basis of insufficient  
knowledge or information." (Pl.'s Sur-Reply 4.) Henceforth, Plaintiff shall not have "two bites  
at the apple" in which to formulate legal arguments to oppose adversarial motions.

whom is not pressing any counterclaims. Because OAH has moved to intervene without delay, the Court finds that OAH's motion is timely.

**ii. OAH Has a Significantly Protectable Interest**

OAH argues that under Ninth Circuit precedent, its interest in contracting with Defendant CDE constitutes a protectable interest, and any Court remedy enjoining a CDE-OAH contract would destroy this interest. (OAH Mot. 4–5.) Plaintiff apparently concedes that OAH has such an interest, arguing instead that the interest is adequately represented by CDE. (*Pl.'s Opp'n* 5; *Pl.'s Sur-Reply* 3–5.)

An applicant has a “significant protectable interest” in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims. Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998). The “interest” test is not a clear cut or bright line rule, because no specific legal or equitable interest need be established. United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002) (finding protectable interest in the terms of a particular injunctive remedy). In an intervention context, courts have found that contract rights are traditionally protectable interests. Southwest Center for Biological Diversity, 268 F.3d at 820.

In this case, it is clear that OAH has an interest in the right to renew its contract with Defendant CDE. Moreover, there is a direct relationship between OAH's contract right and Plaintiff's claims and allegations. According to Plaintiff's Complaint, nearly all of Defendant CDE's supervising liability is derivative of OAH's missteps: to wit, OAH failed to adequately train and supervise judges, (*Compl.* ¶ 7); OAH ALJs rendered faulty and unlawful Decisions, (*Compl.* ¶ 30); OAH judges failed to render decisions in accordance with federal timelines, (*Compl.* ¶ 52.); etc. Because Plaintiff premises CDE's liability nearly entirely on OAH's acts and omissions under the OAH-CDE agreement, the Court finds that OAH has a legally protectable interest sufficiently related to Plaintiff's claims to entitle OAH to intervene as a matter of right.

1                    **iii.     OAH Is So Situated That Disposing Of This Action Would Impact**  
 2                    **or Impede OAH's Ability to Protect Its Contract Interest**

3                    OAH argues that resolving this action without its participation would impact  
 4 OAH's ability to protect its interest in renewing its contract with CDE. (OAH Mot. 5.)  
 5 Plaintiff apparently concedes this point, only arguing that CDE already adequately  
 6 represents OAH's interest. (*Pl.'s Opp'n* 5; *Pl.'s Sur-Reply* 3–5.)

7                    While Plaintiff prays for attorney's fees and costs, the thrust of Plaintiff's action  
 8 seeks a Court order enjoining any new contract between CDE and OAH. (*Compl.*,  
 9 *Prayer for Relief*.) Should Plaintiff prevail, OAH would be prevented, by court order,  
 10 from renewing its contract with CDE. Clearly, the resolution of this action may directly  
 11 impair or impede OAH's ability to renew its rights under contract. See also City of Los  
 12 Angeles, 288 F.3d at 399 (finding intervenor-organization had a protectable interest  
 13 because plaintiff's complaint sought injunctive relief which depended on resolving  
 14 factual allegations that organization's members committed unlawful acts). Additionally,  
 15 given the nature of proving CDE's liability, any factual determinations may effect  
 16 OAH's future interests or contract rights.

17  
 18                    **iv.     Plaintiff and CDE Do Not Adequately Represent OAH's Interests**

19                    OAH argues that neither Plaintiff nor CDE adequately protects its contract  
 20 interest because Plaintiff alleges that CDE did not want to contract with OAH in the  
 21 first place, and thus may not have an equal incentive to renew the deal. (OAH Mot.  
 22 5–6.) Plaintiff contends that OAH and CDE are “obviously acting in concert to benefit  
 23 OAH as much as possible.” (*Pl.'s Opp'n* 5.)

24                    With respect to the fourth element – adequate representation – the court should  
 25 consider several factors. Specifically, an applicant is adequately represented if “(1) the  
 26 interests of a present party to the suit are such that it will undoubtedly make all of the  
 27 intervenor's arguments; (2) the present party is capable of and willing to make such  
 28 arguments; and (3) the intervenor would not offer any necessary element to the

proceedings that the other parties would neglect.” County of Fresno v. Andrus, 622 F.2d 436, 438-39 (9th Cir. 1980) (citing Blake v. Pallan, 554 F.2d 947, 954-55 (9th Cir. 1977)); United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002).

Here, the Court cannot say, at this stage of the litigation, that CDE will undoubtedly make all of OAH’s arguments. This is because the interests of CDE and the interests of OAH are not identical. Whereas CDE may contract with *any* IDEA-qualified agency to retain its federal funding, OAH’s primary interest is in renewing the CDE contract.<sup>2</sup> Furthermore, Plaintiff’s Complaint even alleges that CDE initially resisted to contracting with OAH. (*Id.*) All this supports an inference that OAH has a much higher incentive to oppose any remedy that specifically enjoins a renewed CDE-OAH agreement. Because CDE can potentially find another qualified public or private agency to contract with, (see *Compl.* ¶¶ 98–105,) OAH cannot be assured that CDE is willing to make every argument on OAH’s behalf.<sup>3</sup>

Moreover, OAH may contest Plaintiff’s allegations in a way that CDE might

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<sup>2</sup>This fact is enough to overcome Plaintiff’s argument that “[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.” (*Pl.’s Sur-Reply* 4, citing League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1305 (9th Cir. 1997).) Unlike Wilson, where the defendant-government and intervenor-citizens group both wanted a California Proposition to be held constitutional, the relationship between the parties in this case is more complicated. Although OAH and CDE may both have the “ultimate objective” in renewing their contract, the very nature of contract rights suggests that each party feels they are getting more than they are giving up. Thus, each has a different calculus in how far it will go in defending the existing agreement. As explained above, OAH may have a greater interest in defending the allegations against itself and renewing the CDE contract.

Additionally, Plaintiff misplaces reliance on the proposition that “a state adequately represents its citizens when the applicant shares the same interest.” (*Pl.’s Sur-Reply* 5, citing 7C Wright, Miller & Kane § 1919 at 332.) This is not the situation where a citizen is seeking to intervene because he thinks he can represent his interests better than the state; in this case the state agencies are looking to protect their contract rights, not each other. See also City of Los Angeles, 288 F.3d at 401 (dismissing similar presumption where government was acting as an employer, and not on behalf of a constituency).

<sup>3</sup>As an additional argument equating the interests of OAH with CDE, Plaintiff’s papers refer to a series of emails in which a CDE representative purportedly states “As things stand right now there’s no way on God’s green earth that we are not going to contract with [OAH] on July 1, 2008.” (*Pl.’s Opp’n* 4; *Pl.’s Sur-Reply* 3.) There are several problems with Plaintiff’s argument. First, Plaintiff fails to lay a proper foundation for these emails, making them improper for this Court to consider. Even if the Court could consider them, CDE’s quip is in no way an aphorism that CDE can and will adequately represent OAH’s interest in this particular lawsuit.

1 neglect. The gist of Plaintiff's complaint is that OAH failed to adequately train ALJs  
2 and rendered unlawful due process hearings. CDE is derivatively liable for failing to  
3 adequately supervise or manage OAH. Clearly, OAH possesses the primary evidence  
4 and interest in self-defense to contest Plaintiff's allegations that the training was  
5 inadequate and the hearings were unlawful.

6 Because OAH has timely moved to intervene, has demonstrated a protectable  
7 interest that could be impaired through this litigation, and is not adequately represented  
8 by CDE, the Court hereby finds that OAH is permitted to intervene in this action as a  
9 matter of right. Accordingly, the Court **GRANTS** Intervenor OAH's motion.

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11 **B. OAH Is Allowed to Permissively Intervene In This Action**

12 OAH argues that even if OAH does not enjoy the right to intervene, the Court  
13 should allow permissive intervention under Federal Rule of Civil Procedure 24(b).  
14 Plaintiff disagrees, only contending that OAH lacks an independent base of federal  
15 subject matter jurisdiction. (*Pl.'s Opp'n* 6; *Pl.'s Sur-Reply* 5–7.)

16 In this case, OAH clearly demonstrates common issues of law or fact with the  
17 main action—Plaintiff's Complaint alleges that OAH deficiently trained ALJs and  
18 mishandled due process hearings, charges OAH wishes to defend itself against.  
19 Although courts more strictly analyze the “timeliness” element in permissive  
20 intervention, Wilson, 133 F.3d at 1308, the Court still finds that its above analysis  
21 controls.

22 Plaintiff argues that OAH has not demonstrated any federal claim between OAH  
23 and CDE to independently support jurisdiction, but OAH need not do so because it is  
24 intervening only as a defendant in this action. See Bridgeport Guardians v. Delmonte,  
25 227 F.R.D. 32, 35 (D. Conn. 2005) (allowing litigant to permissively intervene as a  
26 defendant without analyzing whether litigant had independent federal jurisdiction).  
27 Thus, all causes of action in this lawsuit are already properly supported by federal subject  
28 matter jurisdiction. (See *Compl.* ¶ 1.) Should OAH eventually assert its own claims,  
it would of course need an independent basis for federal jurisdiction. For the time being,

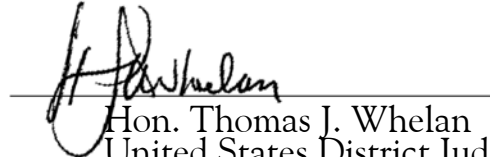
1 however, nothing suggests that OAH is collusively intervening as a mere pretext for  
2 federal jurisdiction. Accordingly, the Court finds that OAH may permissively intervene  
3 as a defendant and **GRANTS** OAH's motion.<sup>4</sup>

4  
5 **IV. CONCLUSION**

6 For the above reasons, the Court finds that OAH may intervene as a matter of  
7 right, and also permissively. Accordingly, the Court **GRANTS** OAH's motion to  
8 intervene and the Clerk of Court is hereby instructed to add OAH as a named  
9 defendant in this action.

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11 **IT IS SO ORDERED.**

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14 DATED: April 7, 2008

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17 Hon. Thomas J. Whelan  
18 United States District Judge  
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28 <sup>4</sup>Because the Court finds that OAH may intervene under Rule 24(a) and Rule 24(b),  
the Court does not reach Plaintiff's "conditional intervention" argument. (*Pl.'s Opp'n* 6.) Nor  
does the Court find relevant any of Plaintiff's arguments that OAH not be allowed to intervene  
because it would just be spending more "public funds on a duplicative defense..." (*Id.* 5.)